United States Court of Appeals

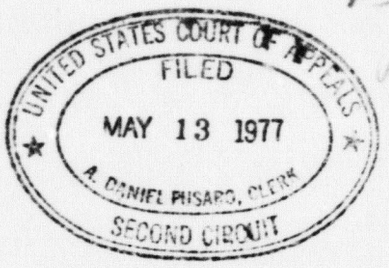
for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1495

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- EUGENE SCAFIDI, BARRIO MASCITTI, ANTHONY DIMATTEO, SAVERIO CARRARA, MICHAEL DELUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI, SR., ROBERT VOULO, and SABATO VIGORITO, Defendants-Appellants.	Docket No. 76-1495

REPLY BRIEF FOR APPELLANT
BARRIO MASCITTI

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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ARGUMENT

APPELLANT HAS STANDING TO CONTEST THE ILLEGAL ENTRIES INTO APARTMENT 309 AND THE HIWAY LOUNGE

Ignoring the two cases directly on point on this issue, the Government argues that appellant Mascitti does not have standing to contest the interception of conversations, pursuant to the illegal surreptitious entries on to either Apartment 309

or the Hiway Lounge, during which appellant's voice was intercepted. For at least four reasons, the Government's conclusion is completely incorrect.

First, appellant has standing to contest the search and seizure since his conversations were illegally intercepted pursuant to a warrant deficient on its face, a defect which may be challenged by any "aggrieved person" as defined by Title III.

United States v. Ford, No. 76-1467 (D.C. Cir. February 11, 1977), although ignored by the Government, is directly on point. In Ford, defendants challenged the surreptitious entry by the police to install a bugging device pursuant to a warrant authorizing electronic surveillance which contained an entry provision. Finding the entry provision overbroad, the court unanimously concluded that the interceptions were suppressible under 18 U.S.C. §2518(10)(a)(i) because the communications were "unlawfully intercepted" as in United States v. Giordano, 416 U.S. 505 (1974), without the authority of a properly issued and suitably circumscribed warrant, and also because under 18 U.S.C. §2518(10)(a)(ii) the warrant was "insufficient on its face" (Slip Op. at 66). The court then held that all "aggrieved persons," as defined in Title III, had standing to contest the search. The court's conclusion is unimpeachable. If the warrant was defective for lack of any entry provision, it was insufficient for any of the surveillances which occurred, and all person named or intercepted

are "aggrieved" by the illegal interceptions.* Here, as in Ford, appellant was an "aggrieved person" under 18 U.S.C. §2518(10)(a) since he was a party to the intercepted conversations both at Apartment 309 and the Hiway Lounge. Thus, here, as in Ford, if express judicial authorization is necessary before the Government may surreptitiously break and enter to install listening devices, the warrant is facially insufficient for the surveillance which occurred, and any aggrieved person has standing to suppress.

The position that the validity of an intercept order may be challenged by any aggrieved person was made clear most recently in United States v. Fury, Slip Op. p.3195, 3199, (Nos. 738, 716)(2d Cir. April 27, 1977), where this Court stated:

> Under both New York State and federal law only an "aggrieved person" has standing to challenge the validity of a wiretap. An aggrieved person is one who has had his conversations intercepted during the wiretap, or is a person against whom the wiretap was directed.
>
> (Citations omitted).

Appellant, as the Government concedes, is clearly an ag-

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*Thus, United States v. Poeta, 455 F.2d 117 (2d Cir. 1972), cert. denied, 406 U.S. 948, and the other minimization cases cited by the Government are completely inapplicable, since they involve interceptions which were legal ab initio and legal as to those individuals whose conversations were seized. While the failure to minimize may have resulted in a search overbroad as to some, it was not illegal as to the defendants. Here, the search pursuant to a defective warrant violates the rights of all persons whose conversations are intercepted. Katz v. United States, 389 U.S. 347 (1967).

grieved person under the statute. Accordingly, he may challenge the breaking and entering. United States v. Ford, supra.

Second, contrary to the Government's assertion, Brown v. United States, 411 U.S. 223 (1973), is totally inapplicable, for here, unlike Brown, appellant was present at the time of the search and seizure. Thus, United States v. Costanza, 549 F.2d 1126 (8th Cir. 1977), another case not cited by the Government, is directly on point. In Costanza, the Government secured a "bugging" order which contained a provision expressly authorizing covert entry for the purpose of installing or removing electronic devices. Id. at 1129. The Government gained entry to the premises, then unoccupied, to install the equipment. Id. at 1130. Appellants challenged the interception order authorizing secret entry, and the Government replied, inter alia, with the same claim as here, lack of standing. The Eighth Circuit had this to say:

> An electronic interception of communications amounts to a search and seizure for fourth amendment purposes, and since the defendants were rightfully on the Necco premises and had some reasonable expectation of privacy in connection with their conversations while there, we conclude that they possess standing to raise the question now under consideration.
>
> Id. at 1134.

While the Government ignores the cases on point, the cases it does cite are completely inapplicable. United States v. Galante, 547 F.2d 733 (2d Cir. 1976), and United States v. Lisk, 522 F.2d 228 (7th Cir. 1976) (Stevens, J.), cert. denied, 423

U.S. 1078 (1976), involve the rights of a possessor of stolen goods to object to a search of premises in which he has no interest and which occurs when he is not present. Here, as Costanza notes, appellant was legitimately on the premises during the electronic search and seizure of his voice.

Third, the Government is totally in error in its argument that appellant lacked a sufficient possessory interest in Apartment 309 to contest the entry. The facts, as found by the court below and admitted by the Government, establish that:

1.) Appellant was a social friend of Engert, the lessee of the apartment.

2.) He paid Engert for use of the apartment.

3.) He was provided with a key to the apartment for his own use.

4.) He regularly used the apartment in the afternoon, although there is no evidence he did not use it on other occasions.

5.) The break-in and interceptions occurred during the months when appellant was using the apartment.

(See, e.g., Government Brief at 14-15.)

In United States v. Jeffers, 342 U.S. 48 (1951), the police seized narcotics belonging to Jeffers during a warrantless search of his aunt's hotel room. Jeffers had been given a key and permission to use the room. On these facts, the Supreme Court upheld Jeffers' standing to contest the search. In subsequent cases, Jeffers has been interpreted as deciding that "As a regular invitee, even though he was not present at the time of the search, his interest in the premises was sufficient to make

the search an invasion of his privacy as well as his aunt's." United States v. Lisk, supra, 522 F.2d at 232; See Mancusi v. DeForte, 392 U.S. 364, 367-368 (1968); Hoffa v. United States, 385 U.S. 293 (1966).* Quite simply, appellant's possessory interest in Apartment 309 was infinitely greater than Jeffers' in his aunt's hotel room, since appellant, unlike Jeffers, paid for the room and used it regularly. Accordingly, appellant must be held to have standing to object to the entry on to Apartment 309.

The Government repeats the error of the court below in asserting that the break-in at Apartment 309 occurred at night, and that there is some significance to that fact. The time of the break-in is irrelevant. If a defendant only uses a premises during the day, he is not deprived of standing to contest a night-time search. Indeed, if the Government's position were correct, there would be no standing to contest any night-time search of a leased business premises, normally open only during the day. That is not the law. See, Mancusi v. DeForte, supra.

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*The Government's citation of United States v. Parizo, 514 F.2d 152 (2d Cir. 1975), in support of its view that appellant lacks "possessory" standing in Apartment 309 is suprising, for Parizo is totally inapposite. There, the court simply held that where the rental period for the defendant's occupancy of a hotel room had expired, he had lost all possessory interest in the premises. Here, defendent's interest in the premises had not expired. Indeed, had appellant abandoned Apartment 309, there would have been no basis for the electronic surveillance. If anything, Parizo, the only case on possessory standing cited by the Government, supports appellant's position.

Moreover, it is crystal clear that the first break-in at Apartment 309 occurred during the day. We now repeat the statement of Fred Barlow, the Assistant U.S. Attorney who tried this case, made during the suppression hearing.

> Agent Parsons informs me that entry to her apartment, 309, was made on the afternoon of December 8th, 1972.
>
> (Suppression hearing at p.72).

The evidence could not be clearer. Mascitti has "possessory" standing to contest the 309 entries and interceptions.

Fourth, appellant Mascitti has standing to object to the entry in Apartment 309 because he was the intended object of the search. United States v. Jeffers, 342 U.S. 48 (1951); United States v. Ford, No. 76-1467 (D.C. Cir. February 11, 1977), slip op. at 66 n.79; see 18 U.S.C. §2518(10)(a)(defining "aggrieved person" as, inter alia, "a person against whom the interception was directed"). While a panel of this circuit has recently expressed some doubt about the continuing vitality of this principle (United States v. Gallante, supra, 547 F.2d at 739 n.11), it is specifically recited in 18 U.S.C. §2518(10)(a) as a basis for standing. In turn, that portion of §2518(10)(a) was cited as a basis for standing in wiretap cases by this court only two weeks ago in United States v. Fury, supra, Slip Op. p.3199. There is absolutely no question that appellant can claim standing under this theory. The Government did not claim probable cause to monitor Engert's conversations, nor was there any evi-

dence in the application to indicate her involvement in gambling. Rather, the entire basis for probable cause to believe that the premises were used for gambling was Mascitti's alleged connection to Apartment 309 and to illegal gambling activity (See Government Brief at 39-41). More than any other person, Mascitti was the target of the 309 surveillance, and of course, Mascitti (as Bary Russo) was named in the orders. Since Mascitti was clearly "a person against whom the interception was directed" he has standing to contest the searches. United States v. Ford, supra.

CONCLUSION

For the above-stated reasons and the reasons stated in appellant's main brief, the judgment of conviction must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 13, 1977

I hereby certify that a copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Eastern District of New York, and to Michael E. Moore, Attorney, Appellate Section, Criminal Division, Department of Justice, Washington, D.C. 20530.

Carol J. Gottlieb